IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16/03/2004

Coram

The Hon'ble Mr.JUSTICE K.GOVINDARAJAN
and
The Hon'ble Mr. JUSTICE N.KANNADASAN

L.P.A.No.112 of 2000
and L.P.A.Nos. 113 and 114 of 2000

1.Santhakumari
2.Jayakumar .. Appellants, in all cases,

-Vs-

1. Lakshmiammal .. 1st respondent, in
L.P.A.No.112/2000.
2.Kasturi
3.Jayaraj
4.Bharath .. Respondents 2 to 4 in L.P.A
Nos.112 &114/2000 & R9 to
R11in L.P.A.No.113/2 000(given up as
unnecessary & as no relief claimed)

1.Munusami
2.Panchatsaran .. All are legal
representatives
3.Kamalakaran of the decd., K.Duraiswami
4.Punniyakoti Pillai/respondents 1 to 8 in
5.Lakshmi Ammal L.P.A.No.113/2000.
6.Muthulakshmi Ammal
7.Devaki
8.Sakunthala

1.P.Rama Reddy .. 1st respondent, in L.P.A.No.114
of 2000.

The above Appeals preferred against the common judgment dated 2.9.19
98 made in A.S.Nos.243 to 245 of 1982 and C.M.P.Nos.5745 to 5747 of 1 998, on
the file of this Court.

!Mr.D.Peter Francis : Counsel for appellants

^Mr.T.K.Seshathri : Counsel for R1 in L.P.A.112; & 114/2000
& for R3 & R5 in L.P.A.113/2000

R2 to R4 -given up in L.P.A.112/2000

R2 to R4 given up in L.P.A.114/2000

:COMMON JUDGMENT

K.GOVINDARAJAN,J.

The defendants in all the suits, preferred the above Letters Patent Appeals, having aggrieved by the judgments and decrees of the trial court and the learned Judge.

2. The respondents/plaintiffs in O.S.Nos.4918 to 4920 of 1976, on the file of the City Civil court, Madras filed the suit for return of purchase money paid pursuant to the sale deed executed by the appellants in favour of the plaintiffs on the ground that the defendants obtained the said money on misrepresentation made by the defendants as if they got a clear title for the same.

3. The properties in question in all the suits were leased out in favour of the plaintiffs' ancestors and the properties leased out were vacant sites, the plaintiffs and their predecessors have put up superstructure over the properties and they have been enjoying the properties by paying meagre rent. The 2nd defendant is the son of Jayarao. So the plaintiffs entered into an agreement with the defendants to purchase the properties for the consideration mentioned therein. Thereafter, the sale deeds were executed under Ex.A1, A4 and A7, dated 5.4.1972, 5.4.1972 and 14.12.1973. Subsequently, in 1976, the plaintiffs have come forward with the above suits seeking a prayer for direction directing the defendants to pay to the plaintiffs the amount paid as sale consideration for the purpose of purchasing the property under Ex.A1, A4 and A7. It is stated in the plaint that they have purchased the property on the basis of misrepresentation made by the defendants as if they are the owners of the properties. But the plaintiffs came to know that the temple records show that the said properties belong to Arulmigu Madhava Perumal temple. With the above said pleadings, the plaintiffs have come forward with the suits to recover the purchase money paid.

4. The said suit was resisted by the defendants stating that they are the owners of the property, that there is no cause of action for sustaining the suit, that the suit filed for recovery of purchase money without asking to set aside the sale deeds cannot be sustained and that the suit without impleading the Madhava Perumal Devasthanam cannot be sustained.

5. The trial court without accepting the defence raised by the appellants decreed the suit. Aggrieved against the same, the appellants preferred Appeals in A.S.Nos.243 to 245 of 1982 on the file of this court. In

the judgment dated 2.9.1998, the learned Judge confirmed the judgment of the trial court holding that the sale transaction in favour of the plaintiffs held to be void and so in view of Sec.55 of the Transfer of Property Act, the suits for repayment of purchase money without asking for cancellation of the documents are maintainable. With respect to the other objections that the suits were filed without any cause of action, the learned Judge found that the pleadings in the plaint coupled with the issue of notice prior to the filing of the suit and the evidence of the witnesses are taken into consideration, it cannot be said that there is no cause of action for filing each suit filed by the plaintiffs. The learned Judge also found that the plaintiffs have not pleaded that they have submitted the documents to the Tahsildar to consider with regard to the issue of patta to the plaintiffs, though such documents were sought for by the Tahsildar to consider their application. Aggrieved against the said common judgment, the defendants have preferred the above Appeals.

6. Learned counsel for the appellants submitted that the learned Judge is not correct in holding that the sale in favour of the plaintiffs are void and so it is not necessary for the plaintiffs seeking a decree for cancellation of the document. He referred to various decisions, which we would deal with the same later. According to him, the predecessor-in-title of the plaintiffs was tenant for a long number of years under the defendants accepting their right to lease out and even after executing the agreements, they had been paying rent to the defendants. So it cannot be said that the sale deeds executed by the defendants are void and thereby the plaintiffs are entitled to file a suit only for recovery of sale consideration, without asking for setting aside the sale deeds. Referring to para 6 of the plaint, learned counsel submitted that there is no cause of action for the plaintiffs to file a suit for refund of purchase money. According to him, it is not the case of the plaintiffs that some third party claiming title disturbed the right and possession of the plaintiffs. The plaintiffs are in possession of the suit properties. In the absence of any such threat, the courts below should not have entertained the suits as there is no cause of action. He also tried to argue to establish the facts that the defendants are having title to the suit property.

7. On the other hand, learned counsel for the respondents took us through the judgment of the learned single Judge in support of his submission that the learned Judge has considered all the aspects and found that the suits for recovery of purchase money simpliciter is maintainable. He also referred to the decisions to support the said submission. Learned counsel has not answered with respect to the argument of the learned counsel for the appellant that the suit should not have been entertained for want of cause of action.

8. So the points for consideration in these Appeals are:-

(1) Whether the suits filed for recovery of purchase money simpliciter without asking to set aside the sale deeds are maintainable?

(2) Whether the trial court is correct in entertaining the suits,

though no cause of action arises for filing such suits?

(3) Whether the defendants are having any title to execute the sale deeds with respect to the suit properties in favour of the plaintiffs?

9. With respect to the third point, we are not inclined to deal with the same without even impleading the Madhava Perumal temple as a party, as the plaintiffs have come forward with the plea that Madhava Perumal temple is the owner of the properties. So, the third point is not discussed and decided.

10. With respect to the first point, learned counsel for the appellants submitted that the sale deeds Ex.A1, A4 and A7, executed in favour of the respondents/plaintiffs, cannot be construed as void, on the basis of the averments made in the plaint that but for the representation by the defendants that they are the absolute owners of the properties and got clear title for the same, the plaintiffs would not have purchased the properties. According to him, the said documents are voidable and so the suits, for recovery of purchase money without seeking to set aside the sale deeds, cannot be sustained.

11. To appreciate the said contention raised by the learned counsel for the appellants/defendants, it is necessary for us to go through the recitals in the sale deeds. For example, in Ex.A1, it is stated that the vendors are the owners and the purchasers are already in possession. It is further stated therein as follows:-

@fpuar; brhj;jpd;nghpy; ve;jtpjkhd tpy;y';fnkh tptfhunkh ,y;iybad;W cWjp brhy;fpnwhk;/ mg;go VjhtJ fld;btspte;J c';fSf;F ec&;lk; Vw;gl; lhy; me;j ec&;lj;ij eh';fs; Kd;dpd;W v';fs; brhe;j brytpy; jPh;j;Jf; bfhLf;ff; flikg;gl;oUf;fpnwhk;/ v';fisj; jtpu fpuar;brhj;jpy; ntW ahUf; Fk; ve;jtpjkhd ghj;aKk; gpd;bjhlh;r;rpa[k; ,y;iy/@

So on the basis of the above said recitals and also on the basis of the averments made in the plaint, now we have to decide whether the respondents/plaintiffs are entitled to sustain the suits for recovery of purchase money leaving the sale deeds, Exs.A1, A4 and A7, unchallenged.

12. The Division Bench of this Court in the decision in Rajah of Ramnad v. Arunachellam Chettiar, AIR 1916 Madras 350, has held as follows:-

"The second contention on behalf of the appellant is that the plaintiff, having elected to terminate the leases on the ground of undue influence, is now entitled to ask the Court for possession without any further setting aside of the instruments. The lease is terminated, the interest transferred to the lessee is re-vested in the lessor, and nothing remains but to give effect to his right to immediate possession. In Janki Kunwar v. Ajit Singh (1888) 15Cal. 58 = 14 I.A. 148 (P.C.) the Privy Council, dealing with this question, observed that it was necessary to bring a suit to set aside the sale on payment of Rs.1,25,000/- before possession could be recovered; but it is argued that that observation assumes the necessity and is not to be taken as

laying down a rule of law that an instrument of transfer which is voidable by the transferor for undue influence can be avoided only by a decree of the Court; or, if it was intended to lay down such a rule, that rule cannot be applied to a transfer made after the enactment of the Trusts Act and the Transfer of Property Act."

13. In the decision in Easwarareddy v.Venkatachellamma, AIR 1954 Madras 83, the learned Judge has found that what all the documents that need to be set aside before asking further prayer and what all the documents need not be set aside,holding as follows:-

"The trial court relied on the Privy Council decision in - 'Jani Kunwar v. Ajit Singh', 15 Cal 58 (PC) : ('88) 14 Ind App 148. This decision has been differentiated by Muthuswami Aiyar, J., in 'Sundaram v. Sithammal', 16 Mad 311 : ('93) 3 Mad LJ 144, which supports the view taken by the learned District Judge, which was substantially to the effect that if the plaint alleges that a sale deed has been taken by fraud or for no consideration, and is void under the Contract Act, in such a case, the registered instrument of sale deed not be set aside before a plaintiff seeks to recover possession, ignoring a document which he alleges is void. The case would be d ifferent in the case of a voidable document such as one induced by undue influence, which would be voidable under S.19-A of the Contract Act and which it would be necessary to set aside before recovering possession. The effect of the case law appears to be that it is only in the latter type of case that Art.91 of the Limitation Act can be applied and that a suit to recover possession with a prayer for setting aside the sale deed shall be instituted within three years prescribed by Art.91, that is " when the facts enabling the plaintiff to have the instrument cancelled or set aside becomes known to him".

14. A Contract tainted by fraud itself cannot be construed as void but only voidable at the option of the party defrauded. So, until it is avoided, the transaction is valid. If there is a fraudulent misrepresentation with respect to the contents mentioned in the document, it has to be held as it is voidable. If such fraudulent misrepresentation was regarding character of a document, the transaction has to be held as void.

15. In the decision in Foster v. Mackinon, (1869) 4 C.P. 704, it is held as follows:-

"It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, has he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended .... The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument."

The above said decision in (1869) 4 C.P. 704 (supra) was followed by the Calcutta High Court in Sanni Bibi v. Siddik, AIR 1919 Cal 608 and in Brindaban v. Dhurba Charan, AIR 1929 Cal 728. The said reasonings and

principles have been accepted by the Apex Court in the decision in Ningawwa v. Byrappa, AIR 1968 S.C. 956 which is relied on by the Division Bench in Sakkarathayammal and Others Vs. Shanmugavel Chettiar and Others (1990 II MLJ 175) to hold that if any fraudulent misrepresentation is with reference to the nature of document, then it has to be held that the transaction is void.

16. In the case on hand the vendors viz., the appellants claim that they are the owners of the property. Even before us, they tried to substantiate the same. So, it cannot be said that knowing that they did not have any title, the vendors sold the property to the plaintiffs. It is not also pleaded that such representation was made fraudulently. There is no averment in the plaint to the effect that the defendants are aware of the defect in title. So the vendors (defendants) cannot be held to be fraudulent so as to enable the plaintiffs to contend that the sale transactions are void. As held in Sachidanand Vs. G.P. & Co. (AIR 1964 Ori 269) the onus is on the purchaser to establish that there was material defect in the seller's title which the seller did not disclose and that the non-disclosure was fraudulent due to non-fulfilment by the ingredients prescribed in Cl. (a) of Sub-section (1) of Section 55 of the Transfer of Property Act.

17. Coming to the present case, it is not in dispute that the predecessors-in-title of the respondents/plaintiffs have been in possession of the suit properties as tenants under the vendors for a long number of years. The representation made in the sale deeds Exs.A1, A4 and A7, even if they are taken as fraudulent, they are only with reference to the contents of the sale deeds and so the documents, Exs.A1,A4 and A7 have to be construed as voidable and unless the said documents are avoided by filing a suit to set aside the same, the respondents/plaintiffs cannot sustain the suits only for recovery of purchase monies. Moreover, in this case, no evidence is available to show that a third party has come and claimed or disturbed the possession of the respondents/purchasers of the suit properties on the ground that the vendors are not the owners thereof but the third party is the owner of the properties. The respondents/purchasers are not new to the suit properties, but they are closely related to the tenants under the vendors. For a long number of years, they have not been disturbed by any threat of claiming title by third parties.

18. While considering similar situation, the learned Judge of the Rajasthan High Court in the decision in Champalal v. Roopa,AIR 1963 Rajasthan 38, has held as follows:-

"From a review of the case law which I have made above, the principle which seems to me to emerge is as follows. Where a seller is guilty of a failure to disclose a material defect in the property sold by him to the buyer and the former is aware of such defect and the latter is not or of which defect the latter could not be aware with ordinary care, then such an omission or or failure on the part of the seller must be held to be fraudulent and where in such a case the buyer stands deprived of the possession of the property sold to him, then it is open to him to bring a suit against the seller for return of the purchase money which the buyer has paid to the seller, and it further seems to me that he may also claim interest by way of damages on such purchase money. This remedy is independent of a suit for rescission of the sale-deed,

which a buyer may also bring if he so chooses, and in such a case he may also sue for damages. It may be that it would be safer in the class of case like the present for the purchaser to sue for the rescission of the sale deed also, but it seems to me that it would be going too far to lay down as an absolute rule of law that a suit for return of the purchase money on breach of warranty of title would be incapable of being maintained in law without suing for the cancellation of the sale deed. I hold accordingly."

The above said decision was strongly relied on by the learned counsel for the respondents/plaintiffs. But, even in the said decision, as stated above, the remedy is independent of suit for rescission of the sale deeds, a buyer may also bring if he so chooses and in such a case he may also sue for damages. Though the learned Judge further held that it would be safer in the class of case like the case before him for the purchaser to sue for rescission of the sale deed, the learned Judge, taking into consideration the facts of that case, felt that the suit for return of purchase money is maintainable in that case. So, even in the said decision it is held that the normal rule is that the sale deed has to be avoided by filing a suit to set aside the sale.

19. In view of the above, it is clear that the respondents/ plaintiffs cannot sustain the suit only for recovery of purchase monies without asking for setting aside the sale deeds, Exs.A1,A4 and A7. The courts below have not properly appreciated the issue on the basis of law laid down in various decisions.

20. In view of the above said finding on point No.1, we are not deciding the issue raised in Point No.2.

21. For all the reasons stated above, the judgment dated 2.9.1998 made in A.S.Nos.243 to 245 of 1982 and that of the trial court dated 30 .8.1980 are set aside. Consequently, these Appeals are allowed with costs. C.M.P.Nos.8632 to 8634 of 2000 are also dismissed.

Index:yes
Internet:yes

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To

1.The Registrar, City Civil Court, Madras.104
2.The Sub-Assistant Registrar (A.S.), High Court, Madras.104.
3.The Record Keeper, V.R. Section, High Court, Madras.104.

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